

CITY OF CHARLOTTESVILLE

"A World Class City"

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April 17, 2017

Hand-Delivered

Llezelle Agustin Dugger
Clerk of Court
Charlottesville Circuit Court
315 East High Street
Charlottesville, VA 22902

Re: Payne, et al. v. City of Charlottesville, Virginia, et al.,
Case No. CL17-145

Dear Llezelle:

Enclosed for filing please find the Defendants' Demurrer to the Complaint and Answer to Plaintiffs' Motion for Temporary Injunction. Thank you in advance for your assistance.

Sincerely,

A handwritten signature in black ink that reads 'S. Craig Brown'.

S. Craig Brown
City Attorney

Enclosures (2)

cc: City Council
Maurice Jones
Ralph E. Main, Jr.
S. Braxton Puryear
Elliot Harding

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

FREDERICK W. PAYNE, *et al.*,)
)
 Plaintiffs,)
)
 v.) Case No. CL17-145
)
 CITY OF CHARLOTTESVILLE, VIRGINIA, *et al.*,)
)
 Defendants.)

DEMURRER TO THE COMPLAINT

Defendants City of Charlottesville, Virginia and Charlottesville City Council, and individual Defendants Signer, Bellamy, Fenwick, Szakos and Galvin, by counsel, pursuant to Virginia Code § 8.01-273 (A) and Rule 3:8 of the Rules of the Supreme Court of Virginia, hereby demur to the Complaint filed herein and state that it is not sufficient as a matter of law and should be dismissed on the following grounds:

1. The Plaintiffs lack legal standing to pursue the claims asserted in their Complaint for the following reasons:

(a) The factual allegations in the Complaint, even if assumed to be true, fail to show that the Plaintiffs actually have a substantial legal right to assert. Vague and conclusory allegations of a “special interest” in the Lee and Jackson statues by Plaintiffs Tayloe (Complaint ¶ 4), Weber (Comp. ¶ 9) and Smith (Comp. ¶ 10), or of an “interest” in preserving the statues by Plaintiffs Griffin, Earnest and Virginia Division, Sons of Confederate Veterans, Inc. (Comp. ¶ 11), are insufficient as a matter of law to demonstrate legal standing.

(b) The Plaintiffs have failed to allege facts demonstrating an actual controversy between the Plaintiffs and the Defendants, such that the Plaintiffs' rights will be affected by the outcome in the case. As a matter of law the allegations that Plaintiff Phillips is a "collateral descendant of Paul Goodloe McIntire" (Comp. ¶ 5), or that Plaintiff Fry is "the great-nephew of . . . the sculptor engaged to create" the Lee statue (Comp. ¶ 6), fail to show any legal right that will be affected by the outcome of the case.

(c) The Plaintiffs have failed to allege facts demonstrating an immediate, pecuniary and substantial interest in the litigation, and have only alleged an anticipated public injury that is in common with other persons similarly situated. As a matter of law alleged past unconditional donations to the City for the purpose of cleaning or maintaining the Lee or Jackson statues, as alleged by Plaintiffs Marshall (Comp. ¶ 8) and Sons of Confederate Veterans (Comp. ¶ 11), are insufficient as a matter of law to establish legal standing. The advancement of a perceived public right, such as walking in or using Lee or Jackson Park, as alleged by Plaintiffs Payne (Comp. ¶ 2) and Yellott (Comp. ¶ 3), is insufficient to establish legal standing.

(d) Corporate Plaintiffs Virginia Division, Sons of Confederate Veterans, Inc. and The Monument Fund, Inc. lack legal standing to pursue the claims asserted as a matter of law, in that representational standing is recognized in Virginia only when it has been specifically authorized by the legislature. Similarly, Plaintiff Phillips has no legal standing to sue as an alleged representative of "the interests of the McIntire family" (Comp. ¶ 5).

2. The claims asserted by Plaintiffs Payne, Yellott, Tayloe, Amiss, Weber and Smith as alleged aggrieved taxpayers in the City of Charlottesville are not ripe for adjudication, even if

assumed to be true. The Complaint merely cites an estimate by City of Charlottesville staff for the cost of “removing and relocating” the Lee statue, and a budget for the development, design and implementation of a “Master Plan” for the Historic North Downtown and Court Square Districts (Complaint ¶ 32, Exhibits I and H). The Complaint fails to allege any specific expenditure of public funds that would allegedly violate the rights of the Plaintiffs.

3. Plaintiffs have failed to state a cause of action for alleged “Statutory Violations” (Count One of the Complaint), in that the statute allegedly violated, Virginia Code § 15.2-1812, was not in existence at the time the Lee statue and the Jackson statue were erected in Lee Park and Jackson Park, respectively, and therefore has no application to either statue or Park.

4. Even if Virginia Code § 15.2-1812 is given retroactive effect and is made applicable to memorials erected before the effective date of the law, the Plaintiffs have failed to state a cause of action for a violation of the statute, by failing to allege any facts demonstrating that the statue of Robert E. Lee is a monument or memorial to any of the wars or conflicts enumerated in Virginia Code § 15.2-1812.

5. Plaintiffs have failed to state a cause of action for an alleged violation of Virginia Code § 15.2-1812.1, which authorizes a cause of action for damages “in such amounts as necessary for the purposes of rebuilding, repairing, preserving and restoring” a protected statue after it has been violated or encroached upon. The Complaint not only fails to identify any violation or damage to either statue, it actually incorporates the City’s representation that “the statue has not been disturbed, interfered with, violated or encroached upon”. (Exhibit J to the Complaint).

6. The allegations in the Complaint that the Defendants will rename and redesign Lee and Jackson Parks fail as a matter of law to state a cause of action for an *Ultra Vires* action or a violation of Dillon’s Rule (Count Two of the Complaint), in that all localities in Virginia have

specific statutory authority to operate, maintain, regulate and improve their real property, including property used for public parks. *See Virginia Code* §§ 15.2-1800 and 15.2-1806. Further, the Plaintiffs' own Exhibits (Exhibit C and Exhibit D) acknowledge that the deeds conveying the park property to the City expressly recognize that the City was retaining the "right and power to control, regulate and restrict the use" of both Parks.

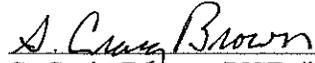
7. The allegations in the Complaint fail to state a cause of action for "Violation of Terms of Gifts" (Count Three of the Complaint), in that the Complaint only identifies two conditions allegedly applicable to the gifts: that the properties be used in perpetuity as public parks, and that no buildings be erected thereon (Exhibit C and Exhibit D). The Complaint fails to identify any actions taken or contemplated by the Defendants that would violate either condition.

WHEREFORE, Defendants City of Charlottesville, Virginia and Charlottesville City Council, and individual Defendants Signer, Bellamy, Fenwick, Szakos and Galvin, by counsel, state that, for the reasons cited herein, the Plaintiffs have failed to allege facts upon which relief can be granted, even if the facts as alleged by the Plaintiffs are assumed to be true; deny that the Plaintiffs are entitled to the relief prayed for in the Complaint; and pray that this Demurrer be granted and that this action be dismissed and that they recover of Plaintiffs their costs expended in this action.

Respectfully submitted,

DEFENDANTS CITY OF CHARLOTTESVILLE,
VIRGINIA, *et al.*

By counsel:



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Demurrer to the Complaint was mailed first class postage prepaid this 17th day of April, 2017 to the following counsel for Plaintiffs:

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